SUPREME COURT, U. S.

SEP 5 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 473

SOUTHERN RAMBLER SALES, INC.,
Petitioner,

versus

AMERICAN MOTORS CORPORATION and
AMERICAN MOTORS SALES CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

C. MURPHY MOSS, JR.,
1836 National Bank of
Commerce Building,
New Orleans, Louisiana 70112,
Counsel for Respondents,
American Motors Corporation
and American Motors Sales
Corporation.

HAUSER-AMERICAN "LEGAL PRINTERS", 316 CHARTRES STREET, NEW ORLEANS, LA.

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OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 375 F. 2d 932.

JURISDICTION

While this Court has discretionary jurisdiction of the application for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit made within 90 days after the entry of the judgment or decree below, re-

spondents submit that said jurisdiction should not be exercised.

QUESTION RAISED

Should this Court review the unanimous judgment below which affirmed the judgment of the District Court dismissing petitioner's action on the grounds that:

(a) no genuine issue of material fact was presented in spite of petitioner's having been afforded every opportunity to support its allegations, and

(b) petitioner could not have made out a case under the Automobile Dealers Day in Court Act in view of the requirement that petitioner prove respondents' lack of good faith, as defined in the Act.

STATEMENT

From January 1958 until July 1960 petitioner was a New Orleans dealer for automobiles manufactured and sold or distributed by respondents. Near the middle of its third year of unsuccessful operation petitioner's franchise was terminated at its own request.

Petitioner filed this action seeking to recover for damages which allegedly resulted from respondents' breach of contract, interference with the sale of petitioner's dealership, violation of the Sherman and Clayton Acts, and violation of the Automobile Dealers Day in Court Act. Respondents denied all allegations.

It is apparent from petitioner's brief and from the opinion of the Court of Appeals for the Fifth Circuit that petitioner has abandoned all of its causes of action except

the one asserted under the Automobile Dealers Day in Court Act, 15 U.S.C.A. §§ 1221-25.

The District Court granted a motion for summary judgment filed by respondents based on a record containing respondents' supporting affidavits and an extensive deposition of petitioner's president and principal stockholder. Thereafter petitioner moved for a new trial and for production of documents, but both motions were denied.

Petitioner's appeal to the United States Court of Appeals for the Fifth Circuit resulted in a decree affirming the judgment of the District Court, and a rehearing was denied.

ARGUMENT

The petition for certiorari fails to focus on any issue justifying consideration by this Court. Petitioner has cited no authority to support its contention that the decisions of the courts below were erroneous. Neither are the issues presented unique or of great importance to the general public. As even petitioner's brief emphasizes, there are no conflicting decisions of appellate or trial courts involving the Automobile Dealers Day in Court Act.

In the absence of special and important reasons for granting certiorari in this matter, there is no occasion for the writ to be granted. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *Layne & Bowler Corporation v. Western Well Works*, 261 U.S. 387 (1923); Rule 19, United States Supreme Court.

Petitioner cannot be heard to contend that it did not have every reasonable opportunity to come forward with proof. The opinion of the Court of Appeals clearly demon-

strates that petitioner sought no discovery until after the District Court had rendered its judgment of dismissal, four years after the action had been filed. Moreover, the testimony of petitioner's president and principal stockholder was aptly characterized by the Court of Appeals as "suppositious, speculative, conclusory and unfactual". 375 F. 2d at 936. Thus, no issue of credibility was presented. The facts before the District Court were undisputed.

The courts below were eminently correct in concluding that no quantity of evidence adduced by petitioner to support its complaint could have made out a case under the Automobile Dealers Day in Court Act. Proof of alleged oral representations by respondents would have been required. Petitioner shrewdly suggests in brief that it depended upon a "series of incidences" as proof of bad faith under the Act, and that it did not seek to prove oral representations for the purpose of varying or contradicting the written franchise agreement between the parties. However, the Court of Appeals properly held that, aside from the proscriptions of parol evidence rules, oral understandings such as those sought to be proved by petitioner which conflict with written franchise provisions are rendered unenforceable by the Act.

Petitioner argues that courts have defeated the purpose of Congress in passing the Act, yet the legislative history of the Act itself establishes that Congress intended to prevent reliance by a dealer upon oral understandings like those asserted by petitioner in attempting to prove lack of good faith under the Act. 3 U.S. Code Cong. & Adm. News, 4596, 4601, 4603-04. Even if petitioner could have proved that respondents orally promised an exclusive dealership but set up additional dealers, or promised a

certain allocation of vehicles but failed to perform as agreed, this is not actionable.

Under the Automobile Dealers Day in Court Act whether a manufacturer has acted in good faith must be determined in the context of coercion, intimidation, or threats of coercion or intimidation. 15 U.S.C.A. § 1221. Unless a plaintiff can show that a new dealership was established as a device to coerce him, he cannot recover. *Garvin v. American Motors Corporation*, 318 F. 2d 518 (3d Cir. 1963); *Victory Motors of Savannah v. Chrysler Motors Corp.*, 357 F. 2d 429 (5th Cir. 1966). Establishment of a competitive dealership only ten blocks away has been held not a failure to act in good faith. *Globe Motors, Inc. v. Studebaker-Packard Corporation*, 328 F. 2d 645 (3d Cir. 1964).

Just as the Act does not guarantee petitioner freedom from competition, it affords petitioner no statutory right or formula for allocation of automobiles. *Globe Motors, Inc. v. Studebaker-Packard Corporation, supra; Augusta Rambler Sales, Inc. v. American Motors Sales Corporation*, 213 F. Supp. 889 (N.D. Ga. 1962); *Bateman v. Ford Motor Company*, 204 F. Supp. 357 (E.D. Pa. 1962); *Leach v. Ford Motor Co.*, 189 F. Supp. 349 (N.D. Cal. 1960).

In *Woodard v. General Motors Corporation*, 298 F. 2d 121 (5th Cir. 1962), *cert. denied*, 369 U.S. 887, *reh. denied*, 370 U.S. 965, the Fifth Circuit Court declared:

> "By the statutory definition, 'good faith' is restricted to a duty to act in a fair and equitable manner so as to guarantee freedom from coercion, intimidation or threats. The plain meaning construction of the definition would give to a dealer a cause of action only if the acts of the dealer [sic]

are not fair and equitable and are coercive. The legislative history supports this construction. In the report of the Committee on the Judiciary of the House of Representatives it is said:

> " 'The principal effect of the bill as amended by the committee is to give the dealer a right of action against the manufacturer, where the manufacturer fails to act in a fair and equitable manner so as to guarantee the dealer freedom from coercion, intimidation or threats of coercion or intimidation. The term 'fair and equitable' as used in the bill is qualified by the term 'so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party.' In each case arising under this bill, good faith must be determined in the context of coercion or intimidation or threats of coercion or intimidation.' H. R. Rep. No. 2580, 84th Cong. 2d Sess. 9.
>
> "Judicial construction has applied the context of coercion doctrine in determining good faith." 298 F. 2d at 127.

Accord, Pierce Ford Sales, Inc. v. Ford Motor Company, 299 F. 2d 425 (2d Cir. 1962), *cert. denied*, 371 U.S. 829; *Milos v. Ford Motor Company*, 317 F. 2d 712, 716 (3d Cir. 1963), *cert. denied*, 375 U.S. 896.

This Court has heretofore considered the issues raised by this petition. Petitioner's complaint alleged that it acted not through coercion but in order to effectively fulfill its contractual commitments. Petitioner failed to produce facts to establish coercion or intimidation, and could not have done so. Such inability to make out a case does not result from improper judicial construction of the Act but from the application of the Act as Congress intended it.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

C. MURPHY MOSS, JR.,
1836 National Bank of Commerce Building,
New Orleans, Louisiana 70112,
Counsel for Respondents, American Motors Corporation and American Motors Sales Corporation.

CERTIFICATE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.

New Orleans, Louisiana, September 1, 1967.

C. MURPHY MOSS, JR.